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7 ROCKMAN COMPANY (USA), INC., et
al.,
8 Plaintiffs,
9 v.
10 NONG SHIM COMPANY, LTD, et al.,
11 Defendants.

Case No. 13-cv-04115-WHO

**ORDER DENYING PLAINTIFFS'
MOTIONS FOR SANCTIONS**

Re: Dkt. Nos. 413, 415, 416, 420,

INTRODUCTION

13 Plaintiffs¹ want sanctions imposed on defendants² for the alleged spoliation of evidence
14 following the inception in June 2008 of an investigation by the Korean Fair Trade Commission
15 (KFTC) into allegations of price-fixing in the Korean Ramen Noodle market. Defendants oppose,
16 arguing that an obligation to preserve documents relevant to the antitrust claims asserted in this
17 case arose only after the inception of this litigation in 2013, and that if any documents were
18 destroyed, that destruction occurred without any intent on the part of defendants to deny plaintiffs
19 access to them in this litigation.

20 The central issue that I decide on these motions is whether a duty to preserve arose in 2008
21 in light of the KFTC's investigation. In other words, should that investigation have put these
22 companies on notice that litigation in the United States was reasonably foreseeable such that they
23 were required to depart from their normal course of conduct where ESI, including email, was
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25 ¹ These motions are brought by the Indirect Purchaser Plaintiffs (IPPs) and the Direct Purchaser
26 Plaintiffs (DPPs).

27 ² The defendants charged with spoliation are Nongshim Co. Ltd. (Nongshim Korea), Nongshim
28 America, Inc. (Nongshim America, collectively Nongshim), Ottogi Corporation, Ltd. (Ottogi
Korea) and Ottogi America, Inc. (Ottogi America, collectively Ottogi).

1 routinely destroyed and hard copy documents were maintained for only a few years. I conclude
2 that given the case law and the facts alleged, defendants did *not* have a duty as of 2008 to preserve
3 evidence for potential use in litigation in the United States.

4 Plaintiffs do not put forward any case law to support their argument that in the context of a
5 foreign government's investigation focused primarily if not exclusively on domestic price fixing,
6 defendants in Korea and their affiliates in the United States had a duty to preserve evidence that
7 would normally otherwise be destroyed because litigation in the United States could someday be
8 commenced. In absence of apposite case law, I decline to reach that far. While Nongshim and
9 Ottogi may have had a duty not to interfere with or impede the KFTC's investigation – assuming
10 the scope of that investigation was known by the defendants and that investigation imposed an
11 affirmative duty to preserve evidence relevant to that investigation, matters very much in dispute –
12 that duty ran to the KFTC and does not translate into a duty to preserve evidence that can be
13 enforced through an award of sanctions by a court in the United States.

14 Plaintiffs may be able to argue in this action the negative implications of the evidence they
15 believe they have uncovered, that Nongshim intentionally destroyed information relevant to the
16 KFTC investigation and that Ottogi altered information in response to the KFTC's investigation. I
17 detail plaintiffs' allegations in this Order, and some raise questions. But those alleged actions
18 were not targeted, aimed, or done with knowledge that they might impede *this litigation*.
19 Therefore, they cannot support the sanctions plaintiffs seek.³

20 BACKGROUND

21 I. INCPETION OF INVESTIGATION OF AND LITIGATION AGAINST NONGSHIM

22 A. KFTC's Investigation and Nongshim's Notice

23 On June 3, 2008, the KFTC conducted an onsite investigation at Nongshim Korea.
24 Declaration of Stephanie Cho [Dkt. No. 456-9], Ex. 20 p. 12.⁴ Nongshim employees and attorneys

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26 ³ To be clear, I am not ruling at this juncture that plaintiffs' evidence of destruction or alteration of
27 documents is admissible. Admissibility of that evidence at summary judgment or trial will be
addressed if plaintiffs seek to rely on it.

28 ⁴ Two more onsite investigations were conducted on January 20, 2010 and July 28, 2011. *Id.*

were prevented from observing what the KFTC employees were doing and what information they were gathering. *Id.* pgs. 12-13. Nongshim contends that the KFTC is not required to and did not inform Nongshim about what documents it took or what it was investigating. Deposition of Joong Rak Lee, Exs. 4A & 4C to Declaration of Joseph P. Grasser [Dkt. No. 436-1]. Nongshim Korea's Vice President at the time, Joong Rak Lee, testified that he was asked about Nongshim's price increases by the KFTC in connection with the onsite visits, *see id.*, but that he was not aware that alleged price collusion between Nongshim and the other defendants was the target of the KFTC investigation until Nongshim received the KFTC's examination report in January 2012. Declaration of Joong Rak Lee [Dkt. No. 432-10] ¶ 5.⁵

Plaintiffs allege that Nongshim had adequate notice that price-fixing *was* the focus of the KFTC investigation in June 2008. Plaintiffs rely on a letter that they assert the KFTC sent Nongshim Korea regarding its investigation on or around June 27, 2008. In that letter – whose recipients are listed as Nongshim, Samyang, Ottogi, and Yakult Korea, and which was produced in this litigation by Ottogi but not by Nongshim – the KFTC informed the recipients that its "Service Cartel Department" was investigating potential violations of Korean antitrust law in the "ramen market." Cho Decl., Ex. 12. The letter requested that Nongshim and the other recipients produce 13 categories of ramen-related documents, including pricing documents. *Id.* Nongshim Korea's executives, including Joong Rak Lee deny receipt of the June 27, 2008 letter. Joong Rak Lee Decl. ¶ 7. Lee questioned the authenticity of the copy of the June 27, 2008 letter presented to him at his deposition (Cho Ex. 12, OTGKR-0018191), because it was not produced by Nongshim, the letter lacks information (*e.g.*, a blank "from" line), and the letter lacks a "chop," an official KFTC seal or stamp. *Id.* ¶ 7.

Plaintiffs contend that other documents produced by Nongshim demonstrate that Nongshim received the June 27th letter and Nongshim was, therefore, on notice of the government's investigation into price collusion in the ramen market. For example, plaintiffs rely

⁵ Nongshim admits that it obtained a little more information as of May 30, 2011, when it was informed of Samyang's leniency petition and its employees were called in for questioning by the KFTC. Grasser, Ex. 27 pg. 12. At that point, Nongshim obtained legal counsel.

on a document with the filename “The Price Structure of Ramen for Overseas Regions (Planning Team_KFTC),” which lists prices (export, landing, and local sales) for export products and which, according to its metadata, was created in June 2008 and last modified in early July 2008 (prior to the date the KFTC’s June 27th letter requested production of documents by). Cho Exs. 14 & 15. Nongshim’s former Vice President Lee argues that the “Price Structure” document could not have been created in response to the KFTC investigation because (i) that document is from Nongshim Korea’s export department which in Lee’s view was not a target of KFTC investigation and is separate from the unit that sets domestic prices, and (ii) the document does not indicate on its face that it was prepared in response to a request for information from the KFTC. Lee Decl. ¶ 8.⁶

Plaintiffs point to a July 22, 2008 document (Cho Ex. 16), that noted that Lee was responsible for providing “additional materials upon the KFTC’s 2nd request.” Lee responds that this document relates to a different KFTC investigation (of large ramen distributors, including E-mart mentioned in the entry at issue), and does not relate to the price-fixing allegations investigated by the KFTC. Lee Decl. ¶ 10.

Plaintiffs next rely on a document they claim is from “August 2008,” titled “2008 Planning Team Performance Review,” which notes action items including a response to “KFTC’s cartel investigation” and the “Cartel policy department’s onsite investigation (June 3) and written investigations (July, August).” Cho Ex. 17. Nongshim responds by pointing to the deposition testimony of Nongshim witness Bo Gyoo Kim who testified (when shown a version of this document) that the document did not appear to be final because it lacked signatures, and was more likely a work in progress. Kim Deposition at 149-151, Ex. 12 to Grasser Decl.⁷

Plaintiffs also rely on a March 2009 document (Cho Ex. 18), where Bo Gyoo Kim had the responsibility to “prepare materials regarding the main cause of price increase for noodle and

⁶ Lee also declares that if the KFTC was seeking information from Nongshim, that request would have been made by the KFTC by telephone to him directly. Lee Decl. ¶ 9

⁷ Plaintiffs use a different version of this document, with a different bates stamp, as an exhibit. Defendants assert that plaintiffs’ exhibit and the exhibit discussed by Bo Gyoo Kim are identical, except that plaintiffs’ exhibit contains a date in the approval box which defendants claim is a translation error. Oppo 8 at n.13.

1 snack products” in response to a KFTC investigation. However, Lee responds that the March
2 2009 document – on its face – relates to a different KFTC investigation into the drinks industry.
3 Lee explains that investigation was highly publicized and that the document at issue captures the
4 fact that Nongshim Korea “contemplated” whether it should prepare materials relating to price
5 increases for noodles and snack products in case it needed to respond to inquiries from the public
6 or press. Lee Decl. ¶ 11.⁸

7 In March 2010, plaintiffs assert that Nongshim was sent (along with Samyang, Ottogi, and
8 Yakult) a letter from the KFTC “Cartel Investigation Department” requesting more ramen related
9 price information. Cho Ex. 22. Lee says that Nongshim Korea did not receive a copy of this letter
10 (Lee Decl. ¶ 13), and as it sought historical information on ramen prices, it could have been
11 relevant to any number of KFTC’s ongoing or potential investigations. See Lee Decl. ¶ 14
12 (describing a number of other matters the KFTC was investigating with respect to Nongshim
13 Korea during this time frame, including distribution and sales arrangements and corporate
14 disclosures).

15 Plaintiffs also rely on a November 2010 “Nongshim Performance Review” drafted by CEO
16 Sang Yoon Lee (allegedly generated following the KFTC January 20, 2010 onsite investigation
17 and a February 2010 summons) to support their assertion that Nongshim knew about the price-
fixing focus of the KFTC investigation. In that document a main “implementation item” was the
19 KFTC’s “cartel investigation” whose “purpose” was “Ramen price collusion” based on sharing of
20 price information with competitors and related to the January site visit and February summons.
21 Nongshim’s Lee describes the November 2010 document as a “summary” of Nongshim Korea’s
22 “speculation” as to whether the KFTC might be investigating price collusion based on employees
23 who overheard comments by or had interactions with the KFTC’s investigators during the January
24 2010 site visit. Lee Decl. ¶ 12. Although the KFTC asked Lee to appear at the KFTC’s offices in

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28 ⁸ Plaintiffs note this document was sent by Nongshim Korea to Kerry Lee a Senior Manager at
Nongshim America’s manufacturing plant, and was produced in this litigation by Nongshim
America but not by Nongshim Korea. Cho Decl. ¶ 85. Plaintiffs rely on the existence of this one
document to argue that Nongshim Korea kept Nongshim America informed about the status of the
KFTC investigation. Motion to Sanction Nongshim at 7.

1 February 2010, according to Lee the KFTC gave no clear indications of what they were
2 investigating and only asked general questions about the business. *Id.*

3 Plaintiffs next rely on a November 16, 2010 email reporting that the KFTC had requested
4 about “100 pages of ramen industry information” and noting that Nongshim employees in various
5 departments gathered responsive materials. Cho Decl., Ex. 23. Nongshim’s Bo Gyoo Kim
6 testified that this document didn’t have anything to do with the KFTC price-fixing investigation,
7 but was in response to materials that KFTC asked Kim to produce for an internal KFTC
8 presentation on the industry. Kim Depo. 193-196.

9 In reply, plaintiffs also rely on a “Nongshim 2008 PowerPoint.” Supplemental Declaration
10 of Stephanie Cho [Dkt. No. 447-11], Ex. 3. Plaintiffs point out that this PowerPoint document
11 lists – in the exact same table format with the same table headers and categories – the exact
12 information the KFTC requested in “Request No. 9” of its June 27, 2008 letter addressed to
13 Nongshim, that Lee claims Nongshim never received. The metadata for this document shows it
14 was last edited on July 2, 2008, four days before the KFTC requested a response. Supp. Cho
15 Decl., Ex. 4; Cho Supp. Decl. ¶ 8. Plaintiffs argue that Nongshim could not have accidentally
16 formulated this exact information, in the exact form that it was requested by the KFTC in the June
17 27, 2008 letter.

18 **B. KFTC’s Findings and Decision of the Supreme Court of Korea**

19 According to Nongshim’s expert declarant Hye Sook Seo (an antitrust lawyer in Korea
20 who served on a committee of the KFTC), the KFTC’s jurisdiction is limited to investigating
21 Korean entities and has no authority to investigate or impose corrective measures based upon
22 conduct occurring outside of Korea. Seo Decl. ¶ 21. Seo also explains that the KFTC issues an
23 “examination report” if it finds, after the conclusion of its investigation, that “corrective measures”
24 need to be taken. Seo Decl. ¶ 23. Here, the KFTC issued its examination report concluding that
25 illegal price-fixing occurred in the Korean market to Nongshim, Ottogi, and the other defendants
26 on January 31, 2012. *Id.* ¶ 26.

27 According to Seo, the allegations discussed in the examination report were regarding price
28 fixing of ramen in the domestic market, and the report did not indicate that KFTC’s investigation

1 extended into Nongshim's prices in the United States. *Id.* ¶ 26. The examination report,
2 according to Nongshim's former Vice President Lee, was the first time that "Nongshim Korea
3 acquired meaningful knowledge or information regarding the KFTC's material allegations"
4 against it. Joong Rak Lee Decl. ¶ 5. Therefore, at that point, Nongshim disclosed the existence of
5 the investigation to the Korean Financial Supervisory Service (similar to the U.S. Securities and
6 Exchange Commission). *Id.* ¶ 6.

7 The examination report is the "initial step" in the KFTC's "deliberation process to
8 determine whether any laws have been violated." *Id.* At the conclusion of the deliberation
9 process, the KFTC makes a final determination as to whether laws have been violated and if so,
10 imposes corrective measures on and issues a written resolution to the entities at issue. Seo Decl. ¶
11 24. Therefore, according to Seo, at the initial examination report stage subsequent civil litigation
12 is merely a possibility. Moreover, each step of the KFTC process (examination report, written
13 resolution) are appealable to Supreme Court of Korea. *Id.* ¶¶ 24, 25.

14 In July 2012, the KFTC issued its final determination, assessing large fines on Nongshim,
15 Samyang, Ottogi, and Yakult for illegal price-fixing in the Korean Ramen market. Cho Decl., Ex.
16 2. The KFTC concluded that starting in 2000, the defendants conspired to raise prices of ramen in
17 Korea, and that pursuant to that agreement, prices were raised in 2001 and five times thereafter
18 through December 2010. *Id.* at 22. Pursuant to their alleged agreement, Nongshim would raise
19 prices first, and the other defendants would follow. *Id.* at 23. The final determination
20 acknowledged that Nongshim followed government policy and as such, discussed with and got
21 approval from the government prior to raising its prices on its main products, but that consultation
22 was voluntary and Nongshim did not consult prior to raising its prices in 2008. *Id.* at 26. The
23 final determination focused on the characteristics of the domestic market, although it noted in
24 passing that Nongshim controls 6% of the global ramen market. *Id.* at 11.

25 In December 2015, the Supreme Court of Korea reversed the KFTC's decisions and
26 findings. Seo Decl., Ex. 1. The Korean Supreme Court determined that there was insufficient
27 evidence of an express concerted agreement to fix prices (in light of hearsay evidence and lack of
28 direct evidence regarding the initial meeting in 2000). *Id.* There was also insufficient evidence to

1 show a tacit agreement to fix prices, in light of the history of government regulation of the ramen
2 market, the history of the market share-dominant company (here Nongshim) increasing its prices
3 and competitors following suit (“follow-the-leader-pricing”), and the differences in the amount of
4 price increases and the timing of the price increases by the “followers” after the leader Nongshim
5 acted. *Id.* There is no discussion in the Supreme Court’s decision of export markets or
6 international markets.

7 In response to the Korean Supreme Court’s ruling, in January 2016 the KFTC revoked and
8 nullified its prior orders and holdings. Seo Decl., Ex. 2.

9 **C. Nongshim’s Document Preservation and Obligations under Korean Law**

10 Plaintiffs assert that the document preservation policy in place at Nongshim Korea in June
11 2008 was Nongshim Korea’s January 2000 policy. That policy required retention of KFTC-
12 related documents for 10 years. Cho Decl., Ex. 13. However, Byung Chul Park (Nongshim
13 Korea’s Manager in its Legal Department) declares instead that a policy from March 12, 2007
14 policy was in effect as of 2008. Declaration of Byung Chul Park [Dkt. No. 432-6], ¶ 6.⁹

15 The 2007 Policy did not require preserving documents related to KFTC investigations and
16 did not address emails at all. Park testified that generally, employees were responsible for
17 deciding which documents (including emails) they needed to retain. *Id.* ¶ 8. Because of the
18 limited email account capacity (30MB or less from 2000 through 2008, and 100MB from 2008
19 through 2014), employees had to carefully manage what emails were retained. *Id.* ¶ 9. Park
20 declares that upon the “litigation hold” in 2013, all emails relevant to this litigation were
21 preserved. *Id.* ¶ 10.

22 During the relevant timeframe, Nongshim believes that when employees were issued new
23 computers, data may have been lost. Similarly, when an employee left the company, his or her
24 computer data would not automatically be transferred to the successor. Deposition Testimony of
25 Hwan Oc Jeong at 23-27, 86-87 (Glasser Decl. Ex. 26). Nongshim America had a policy whereby
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27 _____
28 ⁹ Plaintiffs dispute whether the 2007 Policy discussed by Park was put in place, because at least
one page of the document discussed by Park is described as a “draft,” although the cover page has
a final approval stamp.

1 once an employee leaves, data already deleted would not have been recoverable until after 2010.
2 Deposition of Hosik Shin at 16-17, 27-28 (Grasser Decl. Ex. 28).

3 Plaintiffs rely on their expert declarant Jung Eun Choi [Dkt. No. 420-4] who asserts that
4 under Article 69-2(1) of the Korean Monopoly Regulation and Fair Trade Act (MRFTA) and
5 Article 30-2(2) of Korea's Fair Transactions in Subcontracting Act, business entities (and their
6 executives and employees) can be punished by the KFTC if they impair or impede KFTC
7 investigations. Choi goes on to describe a number of cases where the KFTC has fined companies
8 and their employee for violation of those laws. Choi Decl. ¶¶ 5-10.

9 Nongshim responds to Choi with Seo's declaration, who represented Nongshim in the
10 proceedings against the KFTC at the Seoul High Court and Supreme Court of Korea. Declaration
11 of Hey Sook Seo [Dkt. No. 432-7] ¶¶ 1, 2. Seo asserts that Korean companies and executives do
12 not have an obligation to preserve documents in anticipation of civil litigation or even during a
13 government investigation, and that while companies may be fined if the KFTC determines that
14 executives have intentionally and willfully hindered or evaded investigation by concealing or
15 destroying evidence, the KFTC never alleged Nongshim did so in its investigation (which
16 included forensic searching of Nongshim's workstations and emails). *Id.* ¶¶ 3-8, 16. Seo
17 distinguishes the Korean cases relied on by Choi, because in those cases the KFTC concluded
18 employers instructed employees to hide, discard, or destroy evidence or refused the KFTC access
19 to its systems; actions that Nongshim was not accused of. *Id.* ¶¶ 10-15.

20 Seo and Choi disagree on whether under Article 69-2(7) of the MFRTA companies are
21 obligated not to delete information related to an investigation in order not to interfere with the
22 KFTC's investigation. Compare Seo Decl. ¶ 3 with Supplemental Declaration of Jung Eun Choi
23 [Dkt. No. 451] ¶ 4. Both agree, however, that companies should not delete data or alter
24 documents with an intent to interfere with such an investigation. Whether that occurred here is in
25 dispute.

26 **D. Lack of Production by Nongshim in This Case**

27 Nongshim asserts that it issued litigation hold notices to its employees in September 2013
28 (after Nongshim America had been served in August 2013 with the first complaint in this action,

1 but before Nongshim Korea received service in January 2014). Plaintiffs claim that no litigation
2 hold notices have been produced by Nongshim, and defendants rely only on their own discovery
3 responses to establish the date to support their assertion. Cho Decl. ¶ 89. Nongshim has
4 produced over 414,439 documents to plaintiffs, including 131,339 documents from Nongshim
5 Korea, 128,349 of which were ESI documents. Grasser Decl. ¶ 9.

6 Plaintiffs complain, however, that for at least fourteen custodians identified by plaintiffs,
7 Nongshim was unable to produce *any* ESI because those employees were no longer employed by
8 Nongshim (although they left the company after the 2008 start of the KFTC investigation).
9 Motion for Nongshim Sanctions at 8. Those custodians include former CEO Sang-Yoon Lee.
10 Additionally four high-ranking current Nongshim employees, including Joon Rak Lee and Bo
11 Gyoo Kim – whose testimony Nongshim relies extensively on to oppose this motion – produced
12 no documents. Motion for Nongshim Sanctions at 9.

13 Plaintiffs also allege that the Nongshim Distribution Research Team (DTR) was the body
14 that communicated price information with its competitors, yet Nongshim produced zero emails
15 from the majority of the DRT custodians identified by plaintiffs. *Id.* at 11. Plaintiffs have,
16 however, secured emails sent from some of these Nongshim employees to Samyang employees
17 from an external hard drive produced by Samyang.

18 Plaintiffs compare the paltry number of responsive ESI documents produced by Nongshim
19 Korea, with the much higher number of ESI documents produced by Nongshim America.
20 However, plaintiffs also note that the documents from Nongshim American generally do not
21 include ESI from Korean executives who were “dispatched” or “seconded” from Nongshim Korea
22 to work for a time with Nongshim America. Motion for Nongshim Sanctions at 14-15.

23 Finally, plaintiffs complain of Nongshim’s failure to produce other documents, including
24 documents found on the Samyang Hard Drive that metadata indicate were created by Nongshim,
25 as well as a 2003 version of Nongshim’s annual “Factbook,” which plaintiffs secured from
26 Nongshim’s website prior to the start of this litigation but which was removed from the website

1 after the inception of this litigation and cannot now be located by Nongshim. *Id.* at 16-17.¹⁰

2 II. INCEPTION OF INVESTIGATION OF AND LITIGATION AGAINST OTTOGI

3 A. Ottogi's Notice and Scope of KFTC Investigation at Ottogi

4 As with Nongshim, the KFTC performed an onsite visit at Ottogi Korea on June 3, 2008.
5 Managing Director of the Sales Office, Young Hyun Doh, declares that while the KFTC sought
6 out his department, as the department in charge of setting domestic ramen prices, he did not know
7 anything about the investigation at that time except that it related to ramen and assumed it was
8 related to the new South Korean President's effort to control food prices. Declaration of Young
9 Hyun Doh [Dkt. No. 431-1] ¶ 6. Ottogi does not dispute that it received the June 27, 2008 letter
10 from the KFTC requesting production of documents regarding pricing in the ramen market and
11 collected and provided to the KFTC the documents they requested regarding ramen price setting.
12 Doh Decl. ¶ 7.

13 According to Ottogi, all of the inquiries from the KFTC were about domestic prices and
14 domestic products. It was not until July 2011 that the KFTC asked for data relating to export
15 products. Doh Decl. ¶ 14. Ottogi was told by the KFTC that the export information was needed
16 to exclude export products from the potential fines being considered by the KFTC. *Id.* ¶ 15.¹¹

17 B. Ottogi's Document Preservation and Alleged Alterations

18 Ottogi's document retention policy required the preservation of hard copies of documents
19 "associated with any significant lawsuit." The policy also required preservation of various hard
20 copy document for three years. Doh Decl. ¶ 4. Ottogi did not preserve documents for this case,
21 despite the KFTC investigation, until September 2013.¹²

22
23 ¹⁰ Nongshim criticizes plaintiffs for failing to specifically identify these "Nongshim" documents,
24 and according to its analysis, the "vast majority" of documents with Nongshim metadata on the
Samyang Hard Drive are publicly distributed Nongshim documents.

25 ¹¹ According to Doh, the fines levied by the KFTC in July 2012 were based exclusively on its
26 domestic sales and did not include revenue from the sale of export products. Doh Decl. ¶ 15. To
27 support its position that the KFTC investigation did not address export pricing, Ottogi also relies
on two KFTC documents where the KFTC admitted its investigation was focused on the domestic
market and it determined that export prices were not "subjected to price-fixing." Dkt. No. 85-1
(July 2013 press release); Dkt. No. 95-2 (2014 statement).

28 ¹² Ottogi did not institute a litigation hold on information relevant to this lawsuit until September

1 Both sides agree that when an employee's computer was replaced (or malfunctioned)
2 during the relevant time period, Ottogi Korea did not automatically preserve the data on the old
3 computer, but relied upon employees to select only the documents and information needed going
4 forward. Deposition of Se Chang Lee (Ex. 8A to Declaration of Minae Yu, Dkt. No. 438-5) at 35-
5 37, 52. Ottogi also admits that when an employee was assigned to a new division, most simply
6 discarded their old information. Declaration of Se Chang Lee [Dkt. No. 431-4] ¶ 8; and that
7 departing employees' equipment was most likely wiped. Se Change Lee Depo. at 49-50. The
8 same policies applied at Ottogi America. Declaration of Young Wook Ham [Dkt. No. 431-2] ¶ 3.
9 Ottogi Korea's email system was maintained and operated by a third-party, RDS (and affiliated
10 companies). Declaration of Se Chang Lee [Dkt. No. 431-4] ¶ 4.

11 Prior to 2009, each email account had a limit of 150 MB and an auto-delete of emails older
12 than 3 months. Lee Decl. ¶ 5. Emails transmitted after the storage limit was exceeded or that
13 were older than 3 months could only be saved if downloaded to a local hard drive. *Id.* Both sides
14 agree that in March 2009, RDS shortened the auto-delete timeframe on its central email server so
15 that all emails older than 30 days would be automatically deleted unless the employee downloaded
16 the email to his or her local system. Lee Decl. ¶ 5. At that time, neither the employees working
17 with RDS or RDS were aware of the KFTC investigation. Lee Decl. ¶ 7.

18 Plaintiffs also allege that while Ottogi was preparing its document production in response
19 to the June 27 KFTC requests, senior Ottogi executives and other employees intentionally
20 tampered with years-old internal pricing memoranda to cover up the motives and coordination of
21 the price increases it made as part of the alleged conspiracy. Plaintiffs rely on two specific
22 documents: (i) a January 2004 Memorandum and (ii) a 2005 Internal Memorandum.

23 According to plaintiffs, the "original" January 2004 Memoranda was emailed to Ku by a
24 subordinate (Jung), and Ku forwarded that original January 2004 memo to a different subordinate
25 (Jun). The following day Jun emailed a "revised_doc" (which plaintiffs refer to as the falsified

26
27 2013 and October 2013 (for Ottogi America). Yu Decl., Ex. 11 at no. 16, Ex. 12 at no. 8;
28 Declaration of Young Wook Ham [Dkt. No. 431-2] ¶ 4. However, after that point, the auto-delete
feature for emails was disabled for Ottogi America and Ottogi Korea employees who were likely
to have responsive documents. Yu Decl., Ex. 11 no.16.

1 January 2004 memorandum) back to Ku. Motion for Ottogi Sanctions at 4-5. In the revised
2 memorandum, all language was removed evidencing the relationship between Nongshim and
3 Ottogi's prices (*e.g.*, Ottogi following Nongshim's lead), a chart comparing Nongshim to Ottogi
4 prices, deleted references to Samyang and Yakult, and according to plaintiffs "falsely" represented
5 that the purpose of the price increases was capture escalations in raw material pricing. *Compare*
6 Cho Decl. Ex 14 (original) *with* Ex. 15 (altered); *see also* Declaration of James Vaughn [Dkt. No.
7 421-1] ¶¶ 14-20 (discussing the metadata of the versions of the memoranda).

8 Ottogi responds that with respect to the January 2004 Memoranda, following the June
9 2008 onsite visit, Ottogi informed the KFTC that it had discarded the original hard copies of their
10 price increase "RFA packages,"¹³ and at the KFTC's prompting and with their knowledge, Ottogi
11 attempted to "approximate" the original documents for the KFTC's use. Doh Decl. ¶ 8;
12 Declaration of Bangwan Ku [Dkt. No. 431-3] ¶¶ 6-7. Ku describes reducing the 2004
13 Memorandum down from seven to three pages, because the final memorandum (which was
14 missing and which would have been signed off on by the President in hard copy) would only have
15 been approximately 3 pages in length. Ku Decl. ¶¶ 5, 7.

16 In reply, plaintiffs fault Ku for his "incredible" and unsubstantiated story, note that he does
17 not provide the names of whom he spoke with at the KFTC and provides no contemporaneous
18 documents to support his story, and asserts the "original" memo was in fact the original memo.

19 According to plaintiffs, the 2005 Internal Memoranda was originally created by Byung
20 Bak Cho of "Marketing Team 3" and saved as "Ramen Price Increase Review Plan (05.1.21).doc,"
21 and last modified on March 2, 2005. Cho Ex. 18. On July 4, 2008, plaintiffs contend Doh sent Ku
22 a falsified version of the memo, with a last modified date of July 4, 2008. The "falsified" memo
23 blamed price increases on the increase in raw material costs as opposed to competitor increases,
24

25 _____
26 ¹³ Ottogi intended to produce all copies of its pricing memoranda in hard copy because the KFTC
27 had requested "final documents with all of the approval stamps and signatures." Doh Decl. ¶ 7.
28 The RFA packages – which were created for all prices increases – consisted of (i) a formal request
for approval of a price increase, with a memorandum; (ii) a request for cooperating in
implementing the price increase, which was sent to all Ottogi divisions; and (iii) a notice of price
change, sent to all sales branches. Ku Decl. ¶ 4.

1 omitted references to competitors' price increases, and shortened the memo from five pages to
2 three. Cho Ex. 21; *see also* Vaughn Decl. ¶¶ 21-25 (discussing metadata and content of 2005
3 memoranda). Plaintiffs contend that Ottogi printed the falsified memo, inserted a chop, and
4 provided it to the KFTC as part of the 2005 RFA package. Cho Ex. 23 (SoGap 106).¹⁴

5 With respect to the 2005 Internal Memoranda, Doh declares only that he did not make any
6 changes to it because Ottogi had a complete hard copy it could produce to the KFTC, which is
7 reflected as SoGap 106. Doh admits that he received an electronic copy of that memo from his
8 subordinate Bangwan Ku, which Doh saved on his computer for reference. Doh Decl. ¶ 9.

9 In reply, plaintiffs note that the metadata of the electronic version kept by Doh shows it
10 was edited by Doh with a modified file name, and while both are "authored" by B. Cho and dated
11 February 28, 2005, the "original" version is 4.5 pages long and the "edited" version submitted to
12 the KFTC is only 2.5 pages long. Reply for Ottogi Sanctions at 13. In its brief, Ottogi attempts to
13 argue that the date change in this document can be explained by the fact that Doh saved it on his
14 computer in 2010. Ottogi Opp. at 24. However, in a supplemental declaration, plaintiffs' forensic
15 expert, James Vaughn, explains why that action (saving the memo onto Doh's local drive) would
16 not account for evidence showing the memo had been permanently altered in 2008. Supplemental
17 Declaration of James Vaughn [Dkt. No. 447-7] ¶ 18.

18 Plaintiffs also believe that Ottogi altered a November 2002 Memorandum submitted to the
19 KFTC and Korean Courts (which they believe was modified as late as February 2010), but
20 plaintiffs do not have an "unspoiled" version of that memorandum, so cannot say how it was
21 altered. Vaughn Decl. ¶¶ 26-27. In response, Doh declares that following the 2010 onsite visit,
22 the KFTC asked Ottogi to produce their 2001 and 2002 RFA packages. Doh's subordinate Ku
23 found some documents from those packages, but was again required (at the KFTC's insistence) to
24 submit an "approximation" of the 2002 memorandum. *Id.* ¶¶ 10-11. Ku informed the KFTC he
25 would provide a "close approximate" of the 2002 memorandum, and did so by relying on
26 descriptions of the original memo's contents provided by the former Ottogi employee who had

27
28 ¹⁴ In its Decision, the KFTC identified documents it relied on in reaching its Decision by a
"SoGap" designation.

1 prepared the original memorandum. Ku Decl. ¶¶ 9, 10.

2 In reply, plaintiffs point out that the approximated 2002 memorandum that was produced
3 to the KFTC (identified as SoGap 81 by the KFTC) was captioned “Ramen Product Price Increase
4 Review” and “dated” November 20, 2002, but there is no indication on the version of the
5 document referenced by the KFTC that it was “approximated” or that it was “recreated” in 2010.

6 Ottogi’s Korean law expert declarant, Song Ryu, asserts that Ottogi did not have an
7 affirmative duty to prevent the destruction of documents potentially relevant to the KFTC
8 investigation, and could not be expected to stop the destruction of documents as a normal course
9 of business. Declaration of Song Ryu [Dkt. No. 431-5] ¶¶ 4-7. Ryu, like Nongshim’s declarant
10 Seo, distinguishes the cases relied on by Choi (where the KFTC fined companies or their
11 employees for deleting, altering or preventing access to documents to interfere with or impede
12 KFTC investigations) on the grounds that only interferences that occurred during onsite KFTC
13 investigations are sanctionable. Ryu Decl. ¶ 9. Choi, however, argues that distinction is without
14 support and that Article 69-2(1) of the MFRTA is not limited to interferences with onsite
15 investigations, but with the KFTC’s broader investigation; therefore, it would apply to any attempt
16 to destroy information in an effort to interfere with or impede a KFTC investigation. Choi Supp.
17 Decl. ¶ 6.

18 **C. Lack of Production by Ottogi in This Case**

19 Plaintiffs argue that 18 of the custodians they identified produced no documents because
20 they had either left Ottogi, changed job functions, or had their equipment changed. Ottogi deleted
21 ESI and personal files of employees who left the company, and those employees included the
22 executive who approved the Ottogi price increase in 2008 and who was subject to a summons of
23 investigation issued by the KFTC and Jung, who communicated with the division of Samyang
24 responsible for setting prices. Motion for Ottogi Sanctions at 8-9.

25 Plaintiffs also complain of a lack of (or nonexistent production) from at least six current
26 employees who switched positions or changed equipment and whose documents may have been
27 lost because they did not specifically elect to save certain files. Motion for Ottogi Sanctions at 9-
28 10.

Finally plaintiffs identify specific documents they contend Ottogi has not produced, including documents from Ottogi attached as exhibits to the KFTC July 2012 decision, and documents produced by Samyang which were authored by Ottogi. Motion for Ottogi Sanctions at 12-13.

LEGAL STANDARD

“There are two sources of authority under which a district court can sanction a party who has despoiled evidence: the inherent power of federal courts to levy sanctions in response to abusive litigation practices, and the availability of sanctions under [Federal Rule of Civil Procedure] 37 against a party who fails to obey an order to provide or permit discovery.” *Leon v. IDX Sys. Corp.*, 464 F.3d 951 (9th Cir. 2006) (quotation marks omitted). A trial court’s discretion in selecting the form of a spoliation sanction is broad, and can range from comparatively minor sanctions, such as awarding attorney’s fees, to more severe sanctions, such as dismissal. The determination of an appropriate sanction “is assessed on a case-by-case basis.” *Io Grp. Inc. v. GLBT Ltd.*, 10-cv-1282-DMR, 2011 WL 4974337, at *3 (N.D. Cal. Oct. 19, 2011) (internal quotation marks omitted).

To determine whether spoliation occurred, the majority of courts use some variation of a three-part test: “(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a ‘culpable state of mind;’ and (3) that the evidence was ‘relevant’ to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.” *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 989 (N.D. Cal. 2012) (citing cases).

As courts in this district have recognized, “there is no question that the duty to preserve relevant evidence may arise even before litigation is formally commenced.” *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 990 (N.D. Cal. 2012). Instead, the duty arises when, objectively, a party reasonably should have foreseen litigation. *Id.* (citing cases). As Judge Koh recognized, “[a]lthough the Ninth Circuit has not precisely defined when the duty to preserve is triggered, trial courts in this Circuit generally agree that, ‘[a]s soon as a potential claim is identified, a litigant is under a duty to preserve evidence which it knows or reasonably should

know is relevant to the action.’ *In re Napster, Inc. Copyright Litig.*, 462 F.Supp.2d at 1067; *see also Hynix Semiconductor*, 591 F.Supp.2d at 1061 (determining that future litigation is reasonably foreseeable when it is “more than a possibility”); *AmeriPride Servs.*, 2006 WL 2308442, at *4 (anticipated litigation date is when a potential claim is identified); *see also Hynix Semiconductor Inc. v. Rambus Inc.*, 645 F.3d 1336, 1346–47 (Fed.Cir.2011) (litigation need only be reasonably foreseeable, not immediate or certain).’ *Id.* at 990-991.

If spoliation is found, then courts generally consider three factors to determine whether and what type of sanctions to issue: “(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party.” *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d at 992.

Plaintiffs seek the following sanctions against Nongshim and Ottogi: (i) terminating sanctions (striking the answers of defendants and entering default); or (ii) monetary sanctions to compensate plaintiffs for costs plaintiffs incurred because of the alleged spoliation.

DISCUSSION

I. DUTY TO PRESERVE

The main question I must address – as framed by plaintiffs’ motions – is whether a duty to preserve information enforceable by plaintiffs here arose when the KFTC started its investigation in Korea. Defendants do not dispute that documents relevant to the antitrust theories asserted by plaintiffs in these cases were destroyed in 2008 and thereafter. Instead, they argue they were under no obligation to preserve those documents until the first lawsuit was filed in the United States.

As an initial matter, there are two disputed issues that I need not resolve in order to rule on plaintiffs’ motions: (i) whether Nongshim had adequate knowledge of the scope of the KFTC’s investigation as of 2008; and (ii) whether under Korean law defendants had a duty to alter their normal business routines in order preserve documents in light of the KFTC’s investigation, or whether their duty was simply not to affirmatively attempt to hinder or interfere with that investigation. For purposes of ruling on this motion, I will assume that Nongshim (like Ottogi)

1 had knowledge of the scope of the KFTC's investigation. But my resolution of plaintiffs' motions
2 does not hinge on Nongshim's knowledge regarding the scope of the KFTC's investigation. I will
3 also assume that a duty to preserve records relevant to a KFTC investigation exists under Korean
4 law. But my resolution of plaintiffs' motions does not hinge on any duties arising under Korean
5 law either.

6 Instead, the resolution of plaintiffs' motions turns on plaintiffs' failure to identify a basis
7 either in law or on the facts to hold defendants liable for failing to preserve documents when
8 defendants became aware of the KFTC investigation in 2008. Plaintiffs cite no authority that
9 would impose a duty of preservation on defendants *enforceable* by a court in the United States
10 when a foreign government agency investigates alleged price collusion in *their own* domestic
11 market and no complaints or lawsuits have been filed in the United States. Nor do plaintiffs
12 identify any authority that would allow plaintiffs to move for sanctions in lawsuits pending in the
13 United States based on a defendant's alleged violation of duties under Korean law to preserve
14 documents in light of a government investigation in Korea.

15 It is this lack of authority, combined with the absence of any evidence showing that the
16 alleged conspiracy was *specifically directed* at the United States and the absence of evidence
17 showing that the KFTC's investigation extended to the impact of the alleged collusion on the
18 United States, that leads to the denial of plaintiffs' motions.¹⁵

19 There are a number of cases which have held that a government investigation in the United
20 States *does not* create a duty to preserve evidence with respect to later civil litigation in the United
21 States. In *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 770 F. Supp. 2d 1299 (N.D. Ga.
22 2011), defendants received a Civil Investigatory Demand from the United States Department of
23 Justice Antitrust Division in February 2009, related to alleged collusive activities in setting bag
24 fees. The plaintiffs, who filed a civil antitrust lawsuit regarding the same matter a few months,
25 argued that Delta spoliated evidence because "even though Delta received the CID on February 2,
26

27

¹⁵ To be clear, I am not foreclosing any merits argument that the Korean-based conspiracy was
28 effectuated in part in the United States or that the impacts of the Korean-based conspiracy violated
United States antitrust laws when price increases were implemented in the United States.

1 2009, it waited until May” to suspend its standard electronic document destruction policy. *Id.* at
2 1305-06. The court rejected plaintiffs’ “sweeping and novel theory of spoliation,” and concluded
3 that even if defendant owed a duty not to spoliate evidence to the DOJ with respect to the
4 information sought in the CID, “the Court is unwilling to conclude that upon service of a DOJ-
5 issued CID, a duty to Plaintiffs to preserve documents devolved upon Delta even though Plaintiffs
6 did not file this action until three months later.” *Id.* at 1308. Plaintiffs attempt to distinguish
7 *Delta*, arguing that as alternate findings, the court also concluded that plaintiffs there failed to
8 show prejudice and bad faith by Delta, but the first and central holding of *Delta* is clear. The
9 position of plaintiffs here is even further afield than that in *Delta*, because the investigation was
10 being conducted overseas by a foreign government agency.

11 In *Point Blank Sols., Inc. v. Toyobo Am., Inc.*, No. 09-61166-CIV, 2011 WL 1456029, at
12 *1 (S.D. Fla. Apr. 5, 2011), the court denied a motion for spoliation sanctions despite defendants’
13 failure to preserve evidence covered by government subpoenas. The court recognized defendants’
14 “lackluster adherence to their nebulous oral instruction” to preserve documents after the
15 government subpoenas were received, but where “the alleged destruction of evidence arose
16 primarily when Defendants were under a duty to others (such as government officials who issued
17 subpoenas), but not necessarily these Plaintiffs,” and where the “other litigants” who defendant
18 owed a duty of preservation to were not parties to the litigation at issue and had not sought
19 sanctions in their own right, the court was “reluctant to create a new legal precedent which would
20 establish some type of free-floating or shifting duty which other parties could latch onto in order
21 to seek the sanctions which the parties with standing choose not to pursue.” *Id.* So too here, any
22 rights to the documents allegedly destroyed or tampered with by defendants ran to the KFTC. But
23 there is no evidence that despite extensive forensic searches of defendants’ computer systems and
24 follow up meetings, the KFTC was concerned (much less contemplated sanctioning) defendants
25 for failure to preserve or produce documents.

26 Finally, defendants rely on *FTC v. Lights of Am. Inc.*, No. SACV 10-1333 JVS, 2012 WL
27 695008 (C.D. Cal. Jan. 20, 2012), where the defendants argued that the FTC itself spoliated
28 evidence when the FTC failed to implement a litigation hold on its own attorneys at the

1 commencement of the full-phase investigation or upon the issuance of the CID. The court rejected
2 that argument in large part because litigation was not “reasonably foreseeable” at that point.
3 “Commencement of an internal investigation does not, per se, put an institution on notice of
4 potential litigation.” *Id.* at *3; *see also id.* (“Because many FTC investigations involve the use of
5 a CID conclude without litigation, the issuance of a CID does not make litigation ‘probable.’”);
6 *Kitsap Physicians Serv.*, 314 F.3d at 1001 (9th Cir.2002) (finding that a health care provider’s
7 initiation of an internal investigation did not put the provider on notice of a “specific, future ...
8 lawsuit,” and thus the provider’s failure to keep records from that point on did not constitute
9 spoliation). Here, there was an investigation of collusion in the domestic Korean Ramen market.
10 There is no evidence presented that that investigation explicitly covered collusion directed to
11 foreign markets or even in the export market.¹⁶ The KFTC investigation itself could not have
12 triggered a duty to preserve enforceable in the United States by future litigants.

13 Plaintiffs rely on two inapposite cases where prior litigation and a history of consumer
14 complaints created a duty to preserve. In *Williams v. Basf Catalysts LLC*, No. CV111754JLLJAD,
15 2016 WL 1367375 (D.N.J. Apr. 5, 2016), the court concluded that when defendant faced a lawsuit
16 over asbestos in its talc product in 1979, the defendant had a duty to preserve evidence related to
17 lawsuits filed over the course of the next 20 years. *Id.* at *7 (“Here, not only were Defendants
18 ‘sensitized’ to a need to preserve, the SAC alleges that they fully understood that preserving
19 evidence would subject them to significant liability, yet they entered into a scheme to intentionally
20 destroy evidence in order to frustrate reasonably foreseeable litigation involving substantially the
21 same subject matter and issues. Defendants had a clear duty to preserve that ran to a specific civil
22 plaintiff, and then allegedly destroyed the evidence that would be required by similar individuals
23 in the numerous lawsuits that were reasonably foreseeable.”). Not only was there prior litigation
24 regarding the same general subject matter in *Williams*, there were numerous claims about the same

25
26 ¹⁶ I recognize there is some dispute over whether the KFTC’s investigation focused in part on
27 whether the collusion impacted the export market or whether the KFTC simply sought information
28 about the export market in order to exclude that portion of the market from the fines it eventually
assessed. But whether or not export sales were in fact investigated by the KFTC, no one disputes
that the focus of the KFTC investigation was on the domestic market.

1 issue over the intervening years which also supported a finding of duty. *See also Stinson v. City of*
2 *N.Y.*, No. 10 CIV. 4228 (RWS), 2016 WL 54684, at *4 (S.D.N.Y. Jan. 5, 2016) (duty arose when
3 prior lawsuit “hotly contested” same issue presented in subsequent litigation).

4 Perhaps the most analogous case that supports plaintiffs’ theory – but still far from the
5 facts presented here – is *M & T Mortg. Corp. v. Miller*, No. CV2002-5410(NG)(MDG), 2007 WL
6 2403565, at *2 (E.D.N.Y. Aug. 17, 2007). There, the duty to preserve evidence arose when a state
7 agency “commenced an enforcement action” in court against the defendants. Private litigants filed
8 suit, prior to the settlement of the first action, but given the overlap between the claims alleged and
9 the relevant discovery, the district court concluded the duty to preserve arose when the first, state
10 action lawsuit was commenced. *Id.* at *6. Here, however, not only was there no litigation
11 initiated by the government, there is no evidence of complaints from potential litigants in the
12 United States regarding the eventually challenged conduct. *See, e.g., Phillip M. Adams &*
13 *Associates, LLC v. Winbond Elecs. Corp.*, No. 1:05-CV-64 TS, 2010 WL 3767318, at *3 (D. Utah
14 Sept. 16, 2010) (company put on notice of duty to preserve evidence by complaints of customer
15 about defective product, as well as litigation against other companies in the industry over the same
16 defective product); *Hawley v. Mphasis Corp.*, 302 F.R.D. 37, 48 (S.D.N.Y. 2014) (duty arose
17 when employee filed EEOC complaint and EEOC complaint served on defendant); *Adorno v. Port
18 Auth. of N.Y. & New Jersey*, 258 F.R.D. 217, 228 (S.D.N.Y. 2009)(same). Here there was simply
19 an investigation in Korea by a Korean governmental agency into the Korean market.¹⁷

20 Given the posture of this case, and the facts alleged, I cannot find that litigation in the
21 United States was reasonably foreseeable in 2008 when the KFTC began its investigation.¹⁸

22

23 ¹⁷ *Lunkenheimer Co. v. Tyco Flow Control Pac. Party Ltd.*, No. 1:11-CV-824, 2015 WL 631045
24 (S.D. Ohio Feb. 12, 2015) is instructive. There, the court determined that a foreign corporation
25 could not have reasonably anticipated litigation in the United States until it was sued in the United
26 States. In that case, a licensee based in Australia operated under a license with an Australian
27 forum selection clause and had no significant sales in the United States or presence in the United
States. *Id.* at *6. However, the parties had been in constant dispute over the terms of the license
for over nine years. *Id.* While plaintiffs attempt to distinguish *Lunkenheimer* because the foreign
corporation there had no significant United States sales or presence – and both Nongshim and
Ottogi have that here – there, the foreign defendant was in constant dispute with the actual party
who eventually filed suit in the United States. Facts not present here.

28 ¹⁸ Plaintiffs’ motions are premised on the argument that defendants’ duty arose in 2008.

II. OTHER POTENTIALLY SANCTIONABLE CONDUCT

Plaintiffs also argue that Nongshim has engaged in additional sanctionable conduct, namely: (i) Nongshim's Managing Director Joong Rak Lee's "false narrative" regarding whether Nongshim received the June 27, 2008 letter and when Nongshim gained actual knowledge about the scope of the KFTC's investigation, Reply ISO Sanctions on Nongshim at 9; (ii) that Nongshim destroyed documents after the inception of this litigation, namely the 2003 Nongshim Factbook, that Nongshim was unable to produce but plaintiffs were able to secure a copy of from Nongshim's website prior to the inception of this litigation;¹⁹ (iii) telephone records regarding inter-corporate communications and expense reports for employee trips to meet with competitors; and (iv) other evasive or incomplete discovery responses.

With respect to the telephone records and the evasive or incomplete discovery responses, those issues should have been raised with Magistrate Judge Ryu, who has been overseeing the discovery in this case. I will not rule on them in the first instance. With respect to the 2003 Factbook, because plaintiffs secured a copy of it there is no prejudice from Nongshim's failure to produce it. Plaintiffs do not specifically identify any other allegedly unproduced documents with particularity or show why they have been prejudiced by Nongshim's failure to produce copies of specific documents contained in the Samyang Hard Drive. If issues with respect to authentication arise with respect to the documents from the Samyang Hard Drive (allegedly created by Nongshim, but not produced by Nongshim in discovery), they will be addressed at the appropriate time.

With respect to the allegedly false narrative of Lee and others at Nongshim about Nongshim's notice of the scope of the KFTC's investigation, a determination of whether that narrative is false depends upon facts in dispute. Plaintiffs characterize the explanations of Lee and others at Nongshim as incredible – and that characterization may be persuasive to the trier of fact given various documents plaintiffs have uncovered in Nongshim's production – but that determination is neither necessary nor appropriate on this motion.

¹⁹ Plaintiffs also complain about but fail to specifically identify Nongshim-created documents that Nongshim failed to produce but were found on the Samyang Hard Drive. Motion ISO Nongshim Sanctions at 16.

Similarly, plaintiffs complain of Ottogi's evasive or misleading discovery responses, as well as their failure to produce expense reports and telephone bills. Motion ISO Ottogi Sanctions at 14. Those issues should have been raised with Judge Ryu and I will not address them in the first instance.

III. ADMINISTRATION MOTIONS TO SEAL

The parties have filed a number of motions to seal in conjunction with their filings in support or of or in opposition to the sanctions motions. These motions will be addressed in a separate order.

CONCLUSION

For the foregoing reasons, plaintiffs' motions for sanctions against the Nongshim and Ottogi defendants are DENIED.

IT IS SO ORDERED.

Dated: January 19, 2017

W.H.O.

WILLIAM H. ORRICK
United States District Judge